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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S ANSWER AND TO MEMORANDUM FOR THE SECRETARY OF COMMERCE

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REPLY TO RESPONDENT'S ANSWER

1. Respondent errs in saying (Answer, p. 3) that the Commission has assumed "the position * * * that the census schedules should not be made available to competitors," and in saying that the Commission's statement on the subject "is contradicted by the Commission's practice in this very case." Respondent has misunderstood the statement it criticizes (Petition, pp. 13–14), which merely pointed out that the only protection intended by the Congress to be given to business secrets by the Census Act was that against exposure to competitors, and that the same protec-

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tion is given by both the District Court's order and the Commission's order in this case.*

2. Respondent errs in saying (Answer, p. 3), that the "Court of Appeals * * * held that the privilege * * * covered copies of schedules *retained by Beatrice at the direction of and for the further statistical use of the Department of Commerce.*" The emphasized portion was not held by the court below, nor is it a fact established upon the record; even respondent's proposed findings in the District Court (Dilger Appendix 23a–27a) contain no such assertion.

3. Respondent errs in attributing to the Commission (Answer, p. 5) a contention that Section 9 (a)(3) of the Census Act "is capable of being construed into a permission for the Federal Trade Commission to gain access to the individual reports filed with the Census * * *." The Commission makes no such contention; it contends, on the contrary, that the cited section is entirely inapplicable to the subpoenaed records (Petition 6–7).

4. Respondent errs in attributing to the Commission (Answer, p. 6) an agreement that each subpoenaed copy contains assurances that it cannot be

*The Court order provides (Dilger Appendix 35a) that "the Commission should follow its practice of placing such documents in a confidential file, in order to keep such documents away from the sight and knowledge of all of the [respondent's] competitors * * *." The Commission's order (Commission Appendix 24b) provides: "the hearing examiner can, and should, require that such reports be produced under appropriate protective orders and impounded, or retained under seal, so far as practicable in discharge of the Commission's responsibilities under the law * * *."

used for taxation, investigation or regulation. The Commission contends to the contrary, pointing out (Petition, p. 13) that the comments on the copy pertain only to the report filed with the Census, and not to respondent's retained copies showing what it has reported.

5. Respondent errs in implying (Answer, p. 6) that the subpoenaed records are Census documents rather than company records. Respondent conceded in the Court of Appeals (Brief, p. 20): "The records requested are records of a corporation within 'sections 41–46 and 47–58' [*sic*] of the Federal Trade Commission Act." It is not disputed in this record that the subpoenaed documents were made and kept by the corporation, or that this was done without requirement by statute or regulation to do so, or that the information upon them is solely of the corporation's operations, or that they are in its custody.

REPLY TO MEMORANDUM FOR THE SECRETARY OF COMMERCE

The reasons urged by the Secretary of Commerce for denial of the petition are that he believes that the decision below is correct, and that reversal "would have an extremely serious effect on the operations of the Department of Commerce." The Secretary's memorandum does not discuss the expressed belief that the decision below is correct, confining itself instead to an expression of "the practical and policy considerations" which he believes "require that retained copies of census reports be kept confidential and not subject to subpoena * * *."

We think it fair to characterize those considerations as consisting entirely of reasons why the Secretary believes an immunity to process *ought* to exist for corporations' retained copies of their reports to the Bureau of the Census, and as containing no reason why this Court should conclude that one *does* exist. Since this case turns upon the construction of existing statutory provisions, and the issue it presents is whether by those provisions, properly construed, the Congress *has* created the immunity from process which the Secretary desires, we suggest that his plea is addressed to the wrong forum.

It is the Congress, not the courts, which performs the legislative function of evaluating such "practical and policy considerations" as those urged, in the light of the Congressional objectives embodied not only in the Census Act but also in other legislation, and upon consideration of countervailing national interests and governmental needs, as well as expressions of views from representatives of other interests which might be affected by such legislation. It is not possible for this function to be performed by the courts in the course of litigation. In this case, for example, it is not possible for us here and now to make informed response to the many assertions of fact and statements of opinion contained in the Secretary's memorandum, which are presented in that memorandum for the first time in the case.

While in our view the Secretary's memorandum does not shed light upon the issue of this case, or

urge valid reasons for letting stand an erroneous decision of law, it does, we believe, demonstrate that the matter at issue is one of importance not only to the enforcement of the antitrust laws, as the petition pointed out, but also to the operations of the Bureau of the Census. This, we submit, makes even more evident the importance of its decision by this Court.

The petition for certiorari should be granted.

Respectfully submitted.

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